No. A-848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

76-1861

Florida Boatsmen Association, et als.

Petitioners

v.

Department of Revenue

Respondents

On Petition for Certiorari from the Judgment of the Supreme Court of Florida denying Certiorari to the District Court of Appeal, First District of Florida, Appendix Exhibit 9, Page 48.

PETITION FOR WRIT OF CERTIORARI

David W. Palmer,
David W. Palmer II,
Attorneys for Petitioners
P.O. Box 95
Crestview, Fla. 32536

INDEX

Opinion of the District Court of Appeal, First District, of November 26, 1975, reported at 324 S. (2) 651 wherein the Supreme Court of Florida denied Petition for Certiorari. Appendix Exhibit 9 Page 48; Appendix Exhibit 2 Page 6 (Sustaining retrospective tax)

Opinion in Davis v. Askew 343 So. (2) 1329, March 30, 1977, applying estoppel and denying retrospective tax. Other cases appear in the Table of Cases, infra.

TABLE OF CASES

STATUTES

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. A-848

Florida Boatsmen Association, et als.,
Petitioners,
v.
Department of Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Florida Boatsmen Association, Kelly Boat Service, Inc., and others, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in the above-entitled case of January 10, 1977, Appendix Exhibit 2, Page 6, (denying motion for rehearing of petition for certiorari declining review of the decision by the District Court of Appeal reported as Department of Revenue v. Kelly Boat Service, Inc., 324 So. (2) 651, dated November 26, 1975 rehearing denied January 28, 1976, Appendix Exhibit 9, Page 48.

OPINION BELOW

The opinion of the District Court of Appeal, First District, is reported as Department of Revenue v. Kelly Boat Service, Inc., 324 So. (2) 651 and is printed in Appendix Exhibit 9 hereto, infra, Page 48. The Judgment of the Circuit Court of Leon County, Florida, No. 73-1494

formerly Okaloosa County No. 72-2479, is printed in Appendix Exhibit 9 hereto, infra, Page 48. The Supreme Court of Florida denied certiorari and denied rehearing. Appendix Exhibit 2, Page 6.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C.A. Sec. 1257.

The judgment of the District Court of Appeal (Appendix Exhibit 9, infra, Page 48) was entered on November 26, 1975. A timely petition for rehearing was denied on January 28, 1976. (Appendix Exhibit 9, infra Page 48.) The time for filing this petition was extended until June 9, 1977. Appendix Exhibit 1, Page 3.

Kelly II (as designated in Davis v. Askew 342 So. (2) 1329, Appendix Exhibit, Page 50) one of the petitioners at bar, according to the decision from which this appeal is taken, reported as Department of Revenue v. Kelly Boat Service, Inc., 324 So. (2) 651, Appendix Exhibit 9, Page 48, denies to Kelly the equal protection of the laws as accorded to Davis, Appendix Exhibit 10, Page 50, contrary to the provisions of the Fourteenth Amendment. Kelly must pay the tax while Davis is not required to pay the tax.

As the evidence shows, since 90 per cent of the day's fishing is done on the high seas and beyond the borders of the State of Florida, the refusal to prorate, or allocate, the tax to that portion of time actually spent in Florida, is a denial of due process of law.

GMC v. Washington 84 S. Ct. 1564; 377 U.S. 436;12 L.Ed. 439

Toomer v. Witsell 334 U.S. 385;410;;92 L.Ed. 1460;68 S.Ct.1156

James v. Dravo 302 U.S. 134; 82 L.Ed. 155;58 S.Ct. 208.

Complete Auto Transit, Inc. v. Brady No. 76-29.

Taxation 51 Am.Jur Sec. 58, 61

Petitioners' privileges are abridged when a citizen from Tennessee boarding a boat in Pensacola is required to pay a tax while the same citizen, fishing in the same area on the high seas, boards a boat in Mobile but is not required to pay any tax.

The imposition of the tax as here proposed is an undue burden on interstate commerce contrary to the provisions of the Constitution. The trial court so held in Kelly I, Appendix Exhibit 3, Page 7.

The attempted tax is in violation of the Admiralty Clause of the Constitution.

QUESTIONS PRESENTED

1. Does the Florida Statute 212.04, 212.02 (16 and 17), Appendix Exhibit 11, Page 57, impose any tax on fishing on the high seas and beyond the borders of the State of Florida? If this question is answered in the negative the major issue will have been settled. The Circuit Court in Kelly No. 15,117, on June 24, 1966, held the law did not impose any tax and that the statute was in conflict with the Commerce Clause. On appeal this judgment was affirmed and rehearing denied June 4, 1968, Straughn v. Kelly 210 So. (2) 266, Appendix Exhibit 5, Page 11,. This, we think, became the "law of the case." The question is "res judicata". It is "stare decisis". The doctrine of "estoppel" has been properly applied in Davis, Davis v. Askew 343 So. (2) 1329, Appendix Exhibit 10, Page 50.

This was considered to be the settled law for almost four years or until after January 6, 1972, when, based on an erroneous statement of fact and contrary to the evidence, in effect, the court held that "fishing" was an "admission" and taxable as such.

Department of Revenue v. Pelican Ship 257 So. (2) 56, Appendix Exhibit 8-a, Page 44. Pelican did not hold that

the tax was retrospective. It was in the case at bar, DOR v. Kelly Boat Service No. Y-315, reported at 324 So. (2) 651, dated November 26, 1975, Appendix Exhibit 9, Page 48, rehearing denied January 28, 1976, that the court imposed the tax retrospectively. The Supreme Court of Florida declined to review this case so this petition followed, Appendix Exhibit 2, Page 6. On March 30, 1977, the District Court, but different panel, applied the doctrine of "estoppel" and denied the retrospective tax in Davis v. Askew, 323 So. (2) 1329, Appendix Exhibit 10, Page 50.

If, contrary to Kelly I, 15,117, Appendix Exhibit 3 and 5, Pages 7 and 11, the tax is sustained, and, if contrary to Kelly II, Appendix 10, Page 50, but in accord with Davis, supra, the retrospective aspect of the tax is denied, several questions are presented. In the complaint, Appendix Exhibit 6, Page 13, we presented twenty-two questions to the court. The trial court in the case at bar, followed Pelican, sustained the tax, but denied the retrospective aspect, Appendix Exhibit 8, Page 34. R. 173-183. In the Cross Appeal to the District Court appear seventeen assignments of error. R. 192, Appendix Exhibit 8-c, Page 47. When this case was appealed to the Supreme Court as No. 48,865, similar errors were assigned.

In the event that the tax is sustained and question 1, supra, is answered in the affirmative, by this reference we here incorporate and make a part hereof the other sixteen errors assigned, Appendix Exhibit 21, Page 87. These questions include, but not limited to, due process of law, equal privileges, uni ormity in taxation, the maritime and commerce clauses, validity of Florida Statutes, Court Rules, the authority of administrative officials to promulgate regulations which expand the statute to make "fishing" taxable when it is not mentioned in the statute, etc.

2. If the Statute, Appendix Exhibit 11, Page 57, imposes the tax, may the tax be collected retrospectively, contrary to Davis v. Askew, Appendix 10, Page 50.

STATUTES INVOLVED

Florida Statutes 212.04 and 212.02 (16 and 17) are here involved and read as shown in Appendix Exhibit 11, Page 57.

Forida Statutes 213.01 requires "fairness" and impartiality in taxation.

Florida Statutes 212.15 (4) is invalid if and when applied to require a citizen residing in Key West or Pensacola to travel to Tallahassee to get a hearing to determine his constitutional rights. The court erred in transferring the case from Okaloosa to Leon County, Appendix Exhibit 7, Page 33.

Florida Department of Revenue's Rule 12A-1.05 (4) (n)), Appendix Exhibit 12, 12-a, and 12-b, Page 58, 59 and 60, quoted in Bulletin No. DOR 73-4, dated June 19, 1973, attempting to make "fishing" taxable when such word is not mentioned in the statute, is invalid.

Rules 1.220 and 1.230, Florida Rules of Civil Procedure authorize Class actions and the joinder of additional parties. Devlin v. Dickinson 305 So. (2) 848. The Court Order of March 13, 1973, dismissing all parties but Kelly is in error.

STATEMENT

On reviewing the 197 page record as prepared by the Clerk of the Circuit Court in the case at bar, the depositions of eight witnesses with some fifty exhibits they identified, and considering the answers to interrogatories and undeniable official records, we attempt to summarize some of the facts as follows:

1. In 1949 the Florida Legislature enacted Chapter 212 of the Florida Statutes, commonly known as the sales tax. According to the undisputed evidence, plaintiffs are engaged in the "fishing" business and in no other business. They offer no entertainment for which any "admission" can be charged. They never heard of the word "admission" as applied to fishing until the agents coined the word, called fishing an admission so as to bring the business within the meaning of the statute. Petitioners were not qualified to "collect" any tax until 1973. Deposition of L.B. Kelly. If they had collected the tax, contrary to Kelly I, Appendix Exhibit 5, Page 11, prior to Pelican, Appendix Exhibit 8-a, Page 44, they would have been collecting funds illegally and money which did not belong to the State, according to Davis, Appendix Exhibit 10, Page 50.

Fishing as a taxable item is not contained in the statute. Obviously the legislature did not intend to apply the tax to fishing. In 1949 fishing as we know it today did not exist. If the legislature had intended to include fishing as a taxable activity it would have been a simple matter for the word to have been included along with such words as "theaters," "shows" and similar words on which the tax was imposed. For some twelve years and not until 1963, Department of Revenue, referred to as DOR, did not attempt to apply the tax to fishing. No effort was made to require plaintiffs to pay the $1.00 statutory fee and qualify as agents of DOR to collect the tax until 1973 and as a result of the Pelican decision, Appendix Exhibit 12, 12-1 and 12-b, Pages 58, 59 and 60. The Florida Legislature meets every other year. From 1949 until 1963 it was in session on seven different occasions and if the legislature had intended to apply the tax to fishing it would certainly have amended the law to include the word fishing as being taxable. It is reasonable to assume that if any such move had been attempted it would have been bitterly

opposed not only by the fishing industry but by business in general.

The legislature failing to amend the law to make fishing taxable, DOR promulgated a regulation specifically naming "fishing" as a taxable item, Appendix Exhibit 12, 12-a, and 12-b, Pages 58, 59 and 60. This regulation, if valid, would have the force and effect of a statute and many persons would comply and collect the tax without question. Not so with some of the members of the Florida Boatmens Association.

In 1965, DOR seized a Kelly boat for failure to pay the tax, Appendix Exhibit 3, 4, 5, and 6, Pages 7, 10, 11, and 13. The seizure was held to be illegal, Appendix Exhibit 3, Page 7. A restraining order was issued and remains in effect, we think, until this court decides this case, Appendix Exhibit 3, Page 7. Only in some areas and temporarily was the restraining order observed. Because of the venue question and refusal of the trial court to permit all boat owners to join in one suit, it became necessary to file nine suits. Seven of these suits are mentioned in a suit entitled Virgil Anderson, et als. v. DOR No. 76-1933 in Circuit Court, Okaloosa County, Florida, filed October 27, 1976, Appendix Exhibit 14, (not printed). Not less than twelve restraining orders have been entered by seven different Circuit (trial) judges adverse to the contentions of DOR, Appendix 14 (not printed). If these restraining orders had been observed doubtless this case would not have been brought before this court. The action of seven trial court judges entering restraining orders against DOR preventing the collection of this tax is adequate grounds to create a "doubt" about the meaning or intent of the legislature in enacting Chapter 212 in so far as fishing is concerned. If there is such a doubt it should be resolved in favor of plaintiff boat owners and the tax denied as in Kelly 210 So. (2) 266.

DOR v. Brookwood Associates 324 So. (2) 184,187, citing authorities.

On threat of being found guilty of contempt of court, Appendix Exhibit 15 and 16, Page 63 and 65, DOR has cancelled some liens and frozen bank accounts, Appendix Exhibit 14-a, Page 62.

In an effort to show the reasoning behind the restraining orders, we submitted a 16 page brief dated July 11, 1974, Appendix 17, Page 67, which by this reference we incorporate herein. Also, at the request of the trial court, we submitted an eight page brief dated 2/19/75 concerning the retrospective aspect of this tax case citing the carefully considered case of Oklahoma County v. Queen City Lodge 156 P. (2) 340,354. R. 150. A copy of this brief appears in the Record at Page 150 and also at the end of Appendix to Petitioners' Brief in No. 48,865, the case at bar. The facts appear in somewhat greater detail in our briefs filed in Okaloosa County No. 72-2479, Leon County No. 73-1494, District Court of Appeal No. Y-315, 324 So. (2) 651 and Supreme Court No 48,865. All these four number refer to the same case.

REASONS FOR GRANTING THIS WRIT

The granting of this petition for certiorari and the reversal of the case at bar, Florida Boatsmen Association, Kelly Boat Service, et als., cited as Department of Revenue v. Kelly Boat Service, 324 So. (2) 651 will accomplish the following results:

1. It will comply with the mandate of Florida Statute 213.01 reading:

> "It is hereby declared to be legislative intent that the revenue laws of the state be administered in a fair, efficent and impartial manner." Wests Fla. Statutes An.Vol. 10B Sec. 213.01.

2. It will eliminate obvious arbitrary discrimination in taxation. Under Davis v. Askew 343 So. (2) 1329, Appendix Exhibit 10, Page 50. Davis is not required to pay the retrospective tax which is sound law based on equitable principles. Oklahoma, etc. v. Queen City, etc. 156 P. (2) 340. IBM v. U.S. 343 F. (2) 914 holds that one person may not be taxed when its competitor is not required to pay the tax.

3. It will reconcile conflicting decisions by the District Court of Appeal. In Straughn v. Kelly 210 So. (2) 266 the tax is held illegal, Appendix Exhibit 5, Page 11. In Department of Revenue v. Kelly 324 So. (2) 651, Appendix Exhibit 9, Page 48, not only is the tax sustained but also it is imposed retrospectively resulting in financial disaster. In Davis v. Askew, supra, the retrospective tax was denied. In Department of Revenue v. Brookwood Associates 324 So. (2) 184,187 the court followed the century old law that tax laws are strictly construed, citing 31 Fla. Jurisprudence, Taxation, Section 61 citing cases. To the same effect is 82 CJS Section 396 (b) Statutes. The rule appears to have been followed in about forty states and in the Federal courts.

4. It will restore respect for the court decisions. The trial court in 15,117 held the tax was in violation of the Constitution in that it was an undue burden on interstate commerce. The Final decree bears date of June 24, 1966. It was affirmed April 25, 1968, Appendix Exhibit 3 and 5, Page 7 and 11. Rehearing denied June 4, 1968. The decision was considered to be the "law of the case", at least until after the decision in Pelican, Appendix Exhibit Ex. 8-1, Page 44. In Davis v. Askew, Appendix Exhibit 10, Page 50, it is said that a competitor (meaning Kelly) was "protected". This is not correct according to Kelly II (as designated in Davis v. Askew) Appendix Exhibit 9, Page 48.

5. It will tend to re-establish the soundness of our three divisions of government, the legislative, executive and judicial. In 15,117 the trial court held that the legislature, failing to mention "fishing" as taxable, did not intend to impose the tax, Appendix 3, Page 7. The decree was affirmed on appeal, Appendix Exhibit 5, Page 11. Kelly, et als. relied on it. It was not until after the Pelican decision that the boat owners were required to pay the $1.00 statutory fee to qualify them to act as agents for Florida and to collect the tax, Appendix Exhibit 12, 12-a and 12-b, Pages 58, 59 and 60.

6. It will reassert the fundamental principle that laws are enacted by the legislature, not by administrative agencies. Fla. Statute 212 was enacted in 1949. After failing for more than a dozen years to apply the tax to "fishing", well knowing that the statute did not mention fishing as a taxable item, DOR adopted a regulation in 1963 known as 12 A-1.05 (4) (a), Appendix Exhibit 12, 12-a, and 12-b, Pages 59, 60 and 61, in which "fishing" was specifically mentioned as being taxable. With this regulation the tax agents were able to collect the tax from some persons. The regulation expanded the statute to make "fishing" taxable when the statute did not so provide. This is illegal. Masonite v. Fly 194 F. (2) 257.

7. It will give effect to Rules 1.220 and 1.230, Florida Rules of Civil Procedure. Wests Fla. Stat. An. Vol. 31. The order of the court dated March 12, 1974, dismissed all parties plaintiff except Kelly Boat Service. R. 170, 171 and denied the Class action. This is in error. Florida Rules of Civil Procedure, Rule 1.220 reads:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

State ex rel Devlin v. Dickinson 305 So. (2) 848,850

Rule 1.210 authorizes the joinder of additional parties. Several parties by their despositions, affidavits and motions requested that they be permitted to join as parties plaintiff but were denied the right. Nine different suits were filed.

The 198 page record as certified by the Clerk has been much abbreviated in the Appendix following this petition. Material records which have not been included in the Appendix to this Petition appear in the Record at Page 22, 48, 53, 66, 80, 84, 97, 108, 116, 118, 120, 122, 126, 132, 133, 137, 139, 150, 160, 164, DEPOSITIONS in 3 volumes under separate cover, 166, 167, 170, 183, 192, 196, and 198.

As of October 25, 1972, the trial court was requested to make Findings of Fact 1 to 51 (R.22). An Order was entered on September 24, 1973, Appendix Exhibit 7, Page 33, finding the facts to be as alleged in the complaint, Appendix Exhibit 6, Page 13. R. 79. Findings 52 to 59 was requested, R. 120, as of June 24, 1974. On May 22, 1974, R. 97, DOR was requested to admit 73 facts. The answers appear in the record at pages 108, et seq. On April 15, 1974, depostitions were taken from eight witnesses. This testimony is contained in three volumes and mentioned in the Index as prepared by the Clerk (after P. 164). Based on this undisputed evidence, affidavits and official records, on July 11, 1974, there was presented to the court plaintiffs' Motion for Findings of Fact and Conclusions of Law, 16 pages, requesting the court to make Findings 1 to 20, Appendix Exhibit 17, Page 67. These Findings of Fact were not made. No excuse was offered for failure to make the Findings. As to the retrospective aspect of the case, the judgment of the trial court was favorable to plaintiffs, Appendix Exhibit 8, Page 34. This judgment, on appeal was reversed,

Appendix Exhibit 9, Page 48. A Motion for Rehearing of the Order of December 3, 1974, was timely filed attributing to the trial court eighteen errors. R. 137. This Motion was supported by an 8-page brief. R. 139.

8. The granting of this Petition for Certiorari will sustain thirteen orders entered by seven Circuit Judges entered during this twelve yeras of litigation which orders are adverse to the contentions of respondent.

9. Other and additional reasons for granting the Writ are indicated in Petitioners' Motion for Rehearing dated December 3, 1974, Appendix Exhibit 20, Page 85.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
David W. Palmer,
David W. Palmer II,
Counsel for Petitioners,
P.O. Box 95
Crestview, Fla. 32536

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been mailed to Honorable Robert L. Shevin, Attorney General, The Capitol, Tallahassee, Fla., attention E. Wilson Crump, II, Assistant, this 23 day of June 1977.

David W. Palmer

APPENDICES

APPENDIX A

Supreme Court of the United States

No. A-848

FLORIDA BOATSMEN ASSOCIATION, ET AL.,
Petitioners,
v.
DEPARTMENT OF REVENUE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 9, 1977.

/s/ Lewis F. Powell
Associate Justice of the Supreme
Court of the United States

Dated this 15th
day of April, 1977.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
MONDAY, JANUARY 10, 1977

FLORIDA BOATSMEN ASSOCIATION, ET AL.,
Petitioners,
vs.
DEPARTMENT OF REVENUE OF THE
STATE OF FLORIDA, ET AL.
Respondents.

CASE NO. 48,865

On consideration of the Motion for Rehearing, etc., filed by petitioners, it is ordered that said motion is denied.

OVERTON, C.J., ENGLAND, SUNDBERG, AND HATCHETT, JJ., CONCUR ADKINS, J., DISSENTS

APPENDIX C

DEPARTMENT OF REVENUE
V.
KELLY BOAT SERVICE, INC.
CITE as, Fla. App., 324 So. 2d 651

DEPARTMENT OF REVENUE et al.,
Appellants,
v.
KELLY BOAT SERVICE, INC., et al.,
Appellees

No. Y-315

District Court of Appeal of Florida,
First District.
Nov. 26, 1975.

Rehearing Denied Jan. 28, 1976.

Department of Revenue appealed from summary final judgment entered by the Circuit Court, Leon County, Hal. S. McClamma, J., declaring a commercial boat service liable for payment of the statutory admissions tax on admission fares charged by the boat service at the dock but foreclosing the Department from making assessment against the taxpayer for a period prior to August 1973. The District Court of Appeal, Smith, J., held that the commercial boat service was liable to assessment for the admissions tax; but that the Department of Revenue would not be foreclosed from asserting that the boat service should satisfy its full tax liability incurred within the period prior to August 1973.

Affirmed in part, reversed in part.

1. Theaters and Shows
Commercial fishing boat service, whose boats took on passengers in Florida for fishing in Gulf of Mexico, beyond territorial limits of Florida, was subject to statutory admissions tax to be imposed on admission fares charged by boat service at dock. West's F.S.A. §§ 86.01 et seq., 212.04.

2. Theaters and Shows
Department of Revenue would not be foreclosed from making assessment of admissions tax imposed upon commercial fishing boat service for taxes due during period between August 1970 and August 1973 even though Department did not demand production of taxpayer's records for audit purposes until August, 1973. West's F.S.A. §§ 86.01 et seq., 212.04.

Robert L. Shevin, Atty. Gen., and E. Wilson Cump, III, Asst. Atty. Gen., for appellants.

David W. Palmer and David W. Palmer, II, Crestview, for appellees.

SMITH, Judge.

The Department of Revenue appeals from a summary final judgment of the circuit court declaring, as authorized by Chapter 86, F.S. 1973, the liability of appellee Kelly Boat Service, Inc., for payment of the admissions tax imposed by § 212.04, F.S. 1973. The court held that Kelly, whose boats take on passengers at Destin for fishing in the Gulf of Mexico beyond the territorial limits of Florida, is taxable at the statutory rate on the admission fare charged at the dock, but that the State is foreclosed from assessing Kelly for taxes that should have been paid

between August 1970 and the first day of August, 1973, the month in which the Department demanded the production of Kelly's record for audit. Sec. 212.14(6), F.S. 1973. By cross-appeal, Kelly urges that its activities are not subject to the tax. *Straughn v. Kelly Boat Service, Inc.*, 210 So.2d 266 (Fla.App.1st, 1968). Kelly and other cross-appellants complain also of the trial court's refusal to grant their complaint class action status.

(1,2) The trial court was correct in its reading of our decision in *Department of Revenue v. Pelican Ship Corp.*, 257 So. 2d 56 (Fla.App.1st, 1972), cert. den 262 So.2d 682 (Fla.1972), cert. dism. 287 So.2d 93 (Fla.1974), and in holding that Kelly's commercial activities, as evidenced by the record, render it liable to assessment for the admissions tax. The court was incorrect, however, in foreclosing the Department of Revenue from making the assessment for the full three-year period authorized by § 212.14(6), F.S.1973. The State is not foreclosed, by reason of our 1968 decision in *Straughn v. Kelly Boat Service, Inc.*, or otherwise, to assert that on the facts shown by this record Kelly should satisfy its full tax liability incurred within three years prior to August 1, 1973. *North American Co. v. Green*, 120 So.2d 603 (Fla.1960); *Jackson Grain Co. v. Lee*, 139 Fla. 93, 190 So. 464 (1939), 150 Fla. 232, 7 So.2d 143 (1942).

We have also considered but cannot sustain appellees' other points on the cross-appeal.

Affirmed in part, reversed in part.

BOYER, C.J., and SACK, MARTIN F., Associate Judge, concur.

This petition seeks a review of the order by the Supreme Court of Florida as shown below. As the Supreme Court did not hand down any opinion, more than to deny the petition for certiorari (with one dissent), the decision to be reviewed is by the District Court of Appeal in Case No. Y-315 reported at 324 So.(2) 651. The later decision in Davis v. Askew 343 So.(2) 1329 reaches a different conclusion.

APPENDIX D

Supreme Court of Florida
Thursday, November 4, 1976

FLORIDA BOATSMEN ASSOCIATION, et al.,
Petitioners,
vs.
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, et al.,
Respondents.

CASE NO. 48,865
DISTRICT COURT OF APPEAL,
FIRST DISTRICT
Y-315

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ENGLAND, SUNDBERG and HATTCHETT, JJ., concur
ADKINS, J., dissents

EXPLANATION

Forty copies of this Petition for Writ of Certiorari including Appendix of 88 pages were timely deposited with the Clerk. On June 9, 1977, the Clerk returned the Petition and advised that the Appendix had not been printed according to the requirements of Rule 39. A motion was promptly filed requesting an extension of thirty days time in which to correct the returned petition. By telephone on June 20, 1977, the Clerk's office advised that the 30 days extension of time could not be granted. It was suggested, and agreed to, that the 21 Exhibits in the Appendix be deleted except four Exhibits which follow at the end of the petition. This petition is being submitted according to agreement. For ready reference three copies of the original petition containing the 88 page Appendix are being sent to the Clerk.